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COMMONWEALTH EDISON COMPANY

Proposal to establish Rate CS - Contract Service.

REPLY BRIEF OF ILLINOIS INDUSTRIAL ENERGY CONSUMERS

Opening briefs have been filed in this cause by Commonwealth Edison Company ("Edison"), the Staff of the Illinois Commerce Commission ("Staff"), the Citizens Utility Board ("CUB"), the Cook County State's Attorney ("County"), the City of Chicago ("City"), Northern Illinois Gas Company ("NI-Gas"), Peoples Gas Light and Coke Company and North Shore Gas Company ("PGLC"), Central Illinois Light Company ("CILCO"), and the Midwest Co-Generation Association, Inc., ("Midwest"). The Illinois Industrial Energy Consumers ("IIEC") filed an Opening Brief which stated IIEC's support for the concept of co-generation deferral contracts and load retention rates and suggested that such rates should not be considered as a substitute to moving rates to cost. IIEC did not comment upon the specific provisions of Rate CS and reserved the right to respond to the argument of any party which addressed an area of concern to IIEC.

Certain parties have raised legal arguments in opposition to Rate CS which are broad enough to threaten the Commission's right to authorize co-generation deferral contracts and load retention rates in their entirety. Therefore, IIEC will undertake to respond

to such arguments. In addition, there are certain legal arguments made with regard to the use of long-run marginal cost, long-run incremental costs, short-run marginal costs and short-run incremental costs, which have a potential impact beyond Rate CS and its adoption or rejection by the Commission. IIEC will attempt to respond to these arguments. The failure of IIEC to address any particular argument, or its failure to directly support or oppose Rate CS or any portion of Rate CS, should not be considered as an indication of IIEC's support for or opposition to Rate CS, any part of Rate CS, or any argument made in support of or in opposition to Rate CS or any component part thereof.

I. The provision of service at a price in excess of the incremental cost of providing that service and less than the current firm tariff rates specified in Rate 6L, does not violate Section 9-240 of the Public Utilities Act.

CUB and the County argue that because service under Rate CS will be provided at rates or charges less than those currently specified in Rate 6L, and the rate or charge in each contract will not be approved by the Commission, Rate CS violates Section 9-240 of the Public Utilities Act. Under Rate CS as proposed by Edison, the customer will be required to pay nothing less than the incremental cost of providing service to the customer plus some contribution to fixed costs. Therefore, any contract rate agreed upon by Edison and the Rate CS customer in excess of the incremental cost of providing a service to that customer, plus a contribution to fixed costs will be consistent with the provisions of

Section 9-240 which prohibit any public utility from changing or demanding compensation for service rendered at less than the rates or charges specified in its published tariffs. Presumably, if approved by the Commission, Rate CS will be published in accordance with the Public Utilities Act and service will be rendered in accordance therewith at not less than the minimum rate specified therein.

II. Load retention and co-generation deferred rates are not promotional rates under Section 9-242 of the Act.

Load retention and co-generation deferral rates are not "promotional rates" within the meaning of Section 9-242 of the Act. CUB and the County appear to suggest that because co-generation deferral/load retention rates will result in the continued service of electric load that would otherwise be lost to the system, they are promotional rates. CUB and the County, therefore, reason that the Commission is permitted to study, but not to implement, promotional rates under Section 9-242 of the Public Utilities Act. They conclude that because Rate CS is a load retention rate, it is a promotional rate and therefore is beyond the Commission's power to approve. However, Rate CS is designed to retain current load on the Edison system, it is not intended to increase incremental consumption for electric service. Section 9-242 provides in pertinent part that promotional rates:

> "...are intended to encourage increased consumption of gas or electric service ..., to increase employment or production, or to improve the likelihood that existing customers will remain, or additional industrial or

commercial customers will locate, in Illinois."

Theoretically, appropriately designed residential, commercial and industrial rates for any gas or electric utility will encourage customers to not only use energy more efficiently, but, could encourage the increased usage of energy by a particular class or classes of customers, could encourage a particular customer or group of customers to remain in Illinois or to expand production in Illinois. Under CUB's definition, almost any properly designed and implemented rate of an Illinois Public Utility could be considered a "promotional rate" and thus barred under CUB's interpretation of Section 9-242. However, CUB's interpretation is overly broad. The rate in question is not designed to "increase" consumption on the Edison system, but, to retain existing load (i.e., maintain existing levels of consumption) on the Edison system. Therefore, it is not a promotional rate. Clearly, even if one accepted CUB's interpretation of Section 9-242, which IIEC does not, its application of that interpretation in this case could effectively eliminate all co-generation deferral rates and contracts even those which have established specific levels of charges and been presented to the Commission for approval and published as required by the Act.

III. While it is the goal of the PUA that prices for utility service reflect the long-run incremental cost of providing such service, it is not necessarily a statutory requirement that rates be set at the long-run incremental cost of providing service.

IIEC suggests that Section 1-102 of the Act establishes one of the goals of the Act as the provision of electric service at the long-term cost of such service. While IIEC notes that there are many goals enunciated in Section 1-102, and one of them might be that rates accurately reflect the long-term cost of service, this does not necessarily mean that rates must be set, in all instances, at the "long-term" cost of service. Courts in Illinois have found that the prefatory language of Section 1-102 of the Act does not mandate consideration of the "long-term" cost of providing electric utility service. In the case of Governor's Office of Consumer Services v. Illinois Commerce Commission, 220 Ill.App.3d 68, 580 N.E.2d 920 (3rd Dist. 1991), the Court stated in reference to Section 1-102:

> "This Section is identified simply as 'Findings and Intent'. The section states the general reasons for enactment of the legislation and lists major goals and objectives of public utility regulation. This section neither mandates the adoption of a particular type of cost study, nor requires a certain time period over which such costs are to be developed. Furthermore, 'long-term costs' is not defined in the Act and the Commission is given no direction as to how it is to consider 'long-term costs'."
> Id., 580 N.E.2d at 923

Thus, Section 1-102 does not prevent the adoption of Rate CS or any other co-generation or load retention rate to the extent such rates are designed to allow the utility to recover the incremental cost of providing service plus a contribution to fixed costs.

prices set below long-run incremental costs are not necessarily unlawful. CUB appears to argue that because prices under Rate CS may be set at something below "long-run incremental costs", such prices are predatory and anti-competitive and, therefore, violate Section 13-502(c) of the Act as well as Section 13-507 of the Act. However, CUB fails to note that these sections of the Act are contained in the portion of the Act which is directed toward the telecommunications industry. They have no applicability to the electric industry.

In addition, CUB has failed to present any witness to define the phrase "long-term" in the context of its position in opposition to Rate CS or in the context of the Act, which, as noted above, does not contain a definition of the term in the portion that is applicable to utilities providing electric and/or gas service.

Finally, CUB's reliance upon MCI Communication Corporation v. Ameritech Telephone & Telegraph Company, 708 F.2d 1081, (7th Cir. 1983) is misplaced. In that case, the Court was not called upon to select between a long-run incremental cost standard or a short-run incremental cost standard, but rather to choose between long-run incremental cost and fully distributed costs in determining whether American Telephone & Telegraph Company had engaged in predatory pricing of certain long distance business communication services. (See 708 F.2d at 1120). In fact, the Seventh Circuit Court of Appeals noted that short-run marginal costs was also used by many courts as a standard for determining the existence of predatory pricing.

IV. There should be no requirement that Edison, either or that customers implement energy efficiency programs prior to execution of a Rate CS contract or subsequent to the termination of such a contract.

The record clearly establishes that large industrial customers are sophisticated enough to have explored and probably have explored all economic conservation and energy efficiency measures prior to application for Rate CS service. (Kamien, Edison Ex. 4, P. 5; Juracek, Tr. 89-93). IIEC agrees. Industrial customers remaining on Edison's system should not be required to subsidize energy efficiency improvements at a competitor's plant. The City of Chicago's proposal by implication suggests that remaining captive ratepayers would pay for energy efficiency improvements for customers who would otherwise take service under Rate CS. Such a proposal penalizes those customers who have taken the necessary steps to implement economic and appropriate conservation and energy programs at their manufacturing facility by requiring them to pay for such improvements at a competitor's facility. The City's proposal should be rejected.

V. The City's proposal to exclude Rate CS load from Edison's long-term planning process should not be adopted in the context of this proceeding.

The City proposes that Rate CS load be excluded from the long-term planning process for Edison. However, if Rate CS is adopted in this proceeding, this issue is better addressed in the context of Edison's current least cost planning docket, Docket 92-0268. In

addition, to the extent the incremental cost for a Rate CS contact reflects the cost associated with the next Edison capacity addition (which IIEC understands will be a peaker plant), there is no need to exclude Rate CS load from Edison's long-term planning process. However, IIEC agrees that under certain circumstances it may be appropriate to exclude Rate CS load from the long-term planning process. (i.e., if the incremental cost for Rate CS service does not include a capacity component).

If the Rate CS load is properly reflected in Edison's least cost planning process, and the incremental cost used thereunder includes a capacity component, it is not necessary to terminate the contract at the time the decision to add new capacity is made contrary to the arguments of the City of Chicago.

VI. Co-generation deferral/load retention rates would not violate Federal and State laws which encourage the development of co-generation.

Midwest makes the argument that Rate CS would discourage co-generation by creating obstacles to co-generation similar to those removed by Congress in 1978 in the Public Utility Regulatory Policies Act ("PURPA") and would violate Illinois energy policy as set out in Section 8-403 of the Illinois Public Utilities Act and the rules and regulations promulgated by the Commission thereunder. (Midwest Br., Pp. 4-5). IIEC believes that properly designed and implemented co-generation and deferral rates are fully consistent with PURPA and the Illinois Public Utilities Act. To the extent that Midwest arguments suggest otherwise, IIEC must respectfully

disagree. In its "Economic Development Handbook", 1989, Revised September, 1992, at pages 8 and 9 the Commission has indicated that co-generation deferral rates, etc., are intended to retain present electric load on a utility system. They serve to discourage by-pass of the utility when co-generation and/or self-generation are an uneconomic alternative. That is, they are intended to avoid uneconomic by-pass of the utility's system which would result in remaining ratepayers making up lost revenue through higher rates. According to the Handbook, such rates are traditionally set above the utility's short run marginal cost.

> "Economic co-generation or self-generation is therefore not discouraged since such (co-generation) facilities will be installed if the cost of installation and operation is less than the price of the utility's discounted service, or less than the utility's short-run marginal cost. Thus, market forces result in the most economical solution for the customer considering co-generation or self-generation of electricity." (Economic Development Handbook, Illinois Commerce Commission, Pp. 8-9). (Explanation added)

Section 8-403 of the Act requires the Commission to:

> "...design and implement policies which encourage the economical utilization of co-generation and small power production, ..."

Further, the Section requires the Commission to conduct studies of the policies and procedures necessary to encourage:

> "...the full and economical utilization of co-generation and small power production ...".

Thus, Section 8-403 encourages the "economical" use of co-generation and small power production. Therefore, any co-generation deferral rate and or load retention rate which prevents the

uneconomic by-pass of the utility's system, as defined by the Commission, is fully consistent with the Public Utilities Act.

In addition, a co-generation deferral/load retention rate which is consistent with the Commission policies set out above cannot be considered an obstacle to the development of co-generation under PURPA (16 U.S.C. Sec., 824a-3) to the extent it prevents "uneconomic" by-pass of the utility's system. There is nothing in PURPA to indicate that the Congress intended to encourage the development of uneconomic by-pass of a utility system.

DATED this 17th day of March, 1994.

Respectfully submitted,

ILLINOIS INDUSTRIAL ~~ENERGY CONSUMERS~~

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